

STATE OF MICHIGAN
COURT OF APPEALS

AFAF SOBH,

Plaintiff-Appellant,

v

FARM BUREAU GENERAL INSURANCE
COMPANY OF MICHIGAN,

Defendant-Appellee.

UNPUBLISHED

April 24, 2007

No. 274416

Wayne Circuit Court

LC No. 05-522403-CK

Before: Cavanagh, P.J., and Jansen and Borrello, JJ.

PER CURIAM.

Plaintiff filed this action against defendant, her no-fault insurer, to recover medical and replacement expenses incurred while recovering from an automobile accident. The trial court granted defendant's motion for partial summary disposition under MCR 2.116(C)(7), ruling that plaintiff was not entitled to recover any expenses incurred before August 1, 2004, one year before she filed this action, pursuant to the one-year-back rule of MCL 500.3145(1). The parties later stipulated to dismiss plaintiff's remaining claims while preserving plaintiff's right to appeal the earlier order granting partial summary disposition. Plaintiff now appeals that order, and we affirm. This appeal is being decided without oral argument. MCR 7.214(E).

We review de novo a trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Summary disposition may be granted under MCR 2.116(C)(7) when an action is barred by a statute of limitations.

A defendant who files a motion for summary disposition under MCR 2.116(C)(7) may (but is not required to) file supportive material such as affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3); *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). If such documentation is submitted, the court must consider it. MCR 2.116(G)(5). If no such documentation is submitted, the court must review the plaintiff's complaint, accepting its well-pleaded allegations as true and construing them in a light most favorable to the plaintiff. [*Turner v Mercy Hospitals & Health Services of Detroit*, 210 Mich App 345, 348; 533 NW2d 365 (1995).]

“Absent a disputed issue of fact, this Court decides de novo, as a question of law, whether a cause of action is barred by a statute of limitations.” *Novi v Woodson*, 251 Mich App 614, 621; 651 NW2d 448 (2002).

Plaintiff filed this action on August 1, 2005, seeking reimbursement for expenses incurred in 2003 and 2004. Plaintiff agreed that any expenses incurred before August 1, 2004, were barred by the one-year-back rule of MCL 500.3145(1), pursuant to our Supreme Court’s decision in *Devillers v Auto Club Ins Ass’n*, 473 Mich 562; 702 NW2d 539 (2005). However, plaintiff argued that under the present circumstances, the trial court should exercise its equitable powers to toll the running of the one-year-back provision in this case. Specifically, plaintiff argued that the invocation of equitable tolling was justified by an April 19, 2005, letter from defendant’s agent to plaintiff, which provided:

Dear Afaf Sobh:

Enclosed are bills from Elite Phys[ical] Therapy & Rehab that we have received for consideration of payment. Please note that the enclosed charges are being denied as they were included in the settlement. Therefore, the enclosed bills are your responsibility for payment.

If you have any questions please contact me at the above number.

Sincerely,

Shannon Sharp
Senior Claim Representative

Contrary to what was asserted in the letter, there was no settlement. Plaintiff maintains that the erroneous reference to a settlement misled her into believing that her claim was not denied.

We agree with plaintiff that while *Devillers* overruled the concept of judicial tolling established in *Lewis v DAIIE*, 426 Mich 93; 393 NW2d 167 (1986), it recognized that courts still retain equitable powers in cases of fraud, mutual mistake, or other “unusual circumstances.”

Although courts undoubtedly possess equitable power, such power has traditionally been reserved for “unusual circumstances” such as fraud or mutual mistake. A court’s equitable power is not an unrestricted license for the court to engage in wholesale policymaking

Section 3145(1) plainly provides that an insured “may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced.” There has been no allegation of fraud, mutual mistake, or any other “unusual circumstance” in the present case. Accordingly, there is no basis to invoke the Court’s equitable power. [*Devillers, supra* at 590-591.]

The *Devillers* Court observed that equity may not “trump an unambiguous and constitutionally valid statutory enactment.” *Id.* at 591.

Here, plaintiff relies only on defendant's April 19, 2005, letter to support her claim for equitable relief. Although the reference to a settlement was inaccurate, the letter went on to state, in clear and unmistakable terms, that "the enclosed charges are being denied" and that "the enclosed bills are your responsibility for payment." Thus, the letter could not have misled plaintiff into believing that she would not be responsible for the submitted bills or that defendant had agreed to cover them. Because no other "unusual circumstances" were present, there was no basis for invoking the trial court's equitable powers to avoid application of the one-year-back rule of MCL 500.3145(1) in the present case. The trial court did not err in granting defendant's motion for partial summary disposition.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Kathleen Jansen

/s/ Stephen L. Borrello